

WRITTEN COMMENTS
RECEIVED BY THE ABA
COUNCIL DURING THE
PUBLIC COMMENT
PERIOD OF
DECEMBER 12, 2011
THROUGH
JANUARY 10, 2012
&
ABA'S RESPONSES TO
THE COMMENTS



ARKANSAS
Department of Environmental Quality

December 29, 2011

Anne Laidlaw, Director
501 Woodlane, Suite 101N
Little Rock, Arkansas 72201

**RE: Comment on the
2011 Proposed Revisions to the ABA Minimum Standards and Criteria
Arkansas Building Authority**

Dear Ms. Laidlaw:

The Arkansas Department of Environment Quality (ADEQ) appreciates the opportunity to submit public comments on the proposed revisions to the Minimum Standards and Criteria (MSC). Over the last several weeks we have provided several preliminary comments to your staff, and many have been incorporated into the proposed revised MSC. However, we have noticed an important comment which has not been incorporated. This comment relates to Section 2-200 of the revised MSC. ADEQ previously proposed the inclusion of a definition for the word "fee" when used in the context for professional consultant compensation. Our proposed language follows the meaning of the term "fee" as it is interpreted in the revised MSC. Providing a definition of "fee" within the MSC was suggested as a clarification of the use of the term. Specifically, ADEQ suggests adding the following language to Section 2-200:

(B) The term "fee" as used in Section Two - Design Review Section, Minimum Standards & Criteria (MSC) shall mean all direct labor costs, other direct costs, and all overhead, general and administrative and profit associated with performance of the "basic services" as outlined in §2-201, but excludes allowable reimbursable expenses and any additional approved fee outlined in §2-205 through 2-210 and 2-304.

We again appreciate the opportunity to provide comments to the 2011 Proposed Revisions to the ABA Minimum Standards and Criteria, and hope that you consider the inclusion of this definition in the updated MSC.

Sincerely,

A handwritten signature in black ink, appearing to read "Teresa Marks", is written over a horizontal line.

Teresa Marks, Director
Arkansas Department of Environmental Quality

cc: Roger Lawrence, Chief, Solid Waste Division
Bryan Leamons, Engineering Supervisor, SWMD
Clark McWilliams, Engineer PE, SWMD
Annette Cusher, Engineering Supervisor, HWD
Daniel Clanton, Engineering Supervisor, RST Division
Charles McCool, Engineering Supervisor, Mining Division

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ARKANSAS

BUILDING

AUTHORITY

MIKE BEEBE, GOVERNOR

• ANNE W. LAIDLAW, DIRECTOR

DESIGN REVIEW SECTION

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January 20, 2012

Teresa Marks, Director
Arkansas Department of Environment Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

RE: Comment, 2011 Proposed Revisions to ABA Minimum Standards and Criteria

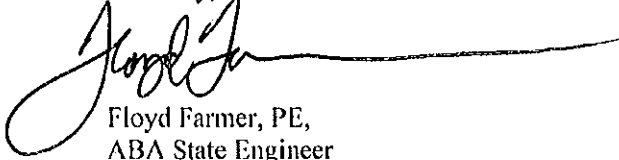
Dear Ms. Marks:

Thank you for your comment and interest in the proposed revisions to the ABA Minimum Standards and Criteria (ABAMSC). As noted in your December 29, 2011 letter, ABA has met with several members of your Agency to review our proposed changes and we have incorporated many of their recommendations into the proposed rules which are currently posted for public comment. We sincerely appreciate your staff's valuable input.

During the November meeting with your staff regarding Section 2, the subject of a definition for the term "fee" was discussed. Definitions are contained within Section 1 of the ABAMSC and are not a part of the current revisions undertaken at this time. ABA is certainly open to providing clarification for this term and will include it with revisions when Section 1 undergoes the revision process this year. The ABA Council has asked that ABA staff begin to review and discuss several issues. One of which pertains to the issue involving fees. We plan on beginning our review and discussion in the early spring with various members of the design community. We will keep your staff informed of what transpires in the coming months regarding fee issues (definition(s), structure(s) and basic services) which are contained in the ABAMSC.

We hope this commitment to reviewing these broader issues will address your concerns and that any delay in incorporating a definition of the term "fee" will not adversely affect your Agency's ability to successfully negotiate professional services contracts. Please feel free to call me if you or staff have any questions.

Sincerely,



Floyd Farmer, PE,
ABA State Engineer

Cc: Dexter Doyne, Chairman, ABA Council
Anne Laidlaw, ABA Director

General question -- There's several references in the summary to legislative changes being incorporated into these rule changes, but I had trouble tracking them. Could I get a list of the Acts that are being incorporated into these rules? *Acts 98 and 1006 of 2011; Acts 193, 532, and 1494 of 2009; and Act 157 of 2007.*

Section 2:

- *§2-302(B) Deletion of the 4-year limitation reference on design professional contracts come from Act 532 of 2009.*
- *Energy Efficiency Standards references contained in § 2-201(A)(2); § 2-201(A)(6); § 2-801; § 2-805(D); § 2-901(B) come from Act 1494 of 2009.*
- *The use of respectful language regarding disabilities in § 2-1000(A) comes from Act 98 of 2011.*
- *Accessibility Standards (ADA) contained in § 2-1000(D); § 2-1001(A) comes from Act 1006 of 2011; and Federal ADA Law revisions contained in the 2010 Accessibility Standards (ADA) are referenced in § 2-1002(A).*

Section 3:

- *Revisions to Section 3-201 reference Act 157 of 2007 regarding illegal immigrant disclosures. This Act was referenced in the rules and bid documents when it became law in 2007. We just added it into another section.*
- *Revisions to Section 3-304 are due to provisions in Act 193 of 2009 regarding the removal of ABA's maintenance of a bidder's list and removal of collection of fees associated with the mailing of bid notifications. Notifications are currently emailed to bidders without payment from contractors.*

Section 4: Revisions to §4-102 (A)(5) regarding the energy efficiencies stem from Act 1494 of 2009.

Section 5: Act 98 of 2011 involving respectful language regarding disabilities was incorporated into the State Lease Form #2 (See 5-105 page 5-18)

General question -- Can you provide me an overview of how ABA's requirements square with the procurement law, and to what extent they are required to do so? I got the impression reviewing the rules that the procurement law does not apply to construction under the ABA's jurisdiction, although you are electing to adopt procurement practices in some instances. *Capital improvements and leases are not commodities contracted through DFA/OSP; they do not follow "procurement" laws (§19-11-203). The bidding of capital improvements are contracted through the public works laws and processes stated in Ark. Code Ann. §§ 22-9-101 et. seq. and 19-4-1401 et seq. Leases are procured and contracted through Section 5 of the ABA MSC. The contracting of design professional services (architectural/engineering/consulting) are acquired by way of a professional services contract which must be approved by DFA/OSP. While the selection process for these services are under ABA's authority (§19-11-801), agencies must have the review/final approval of their professional service contract from DFA/Office of Procurement.*

SECTION 2

(1) 2-101(B) -- Is this language that provides for no ABA approval for professional service agreements of \$5,000 or less a new practice? How does that square with § 22-2-107, which provides for review and approval by the Design Review section? *This is not a new practice. Procurement laws (§ 19-11-204(13)) defines a small procurement of services as \$5000 or less which may be procured without seeking competitive bids or proposals. This paragraph is added to clarify that it is ABA's policy to mirror the procurement law regarding small procurements for professional services agreements.*

(2) 2-102(B) -- I gather that there is less publication of advertisements under this rule? Why was the rule changed to provide for less advertising? How does this provision square with 19-4-1405 and 22-9-203? *The former rules were developed when publication of advertisements in newspapers was the sole method to publish a notice of intent. With the advent of the internet and other electronic media publication of such notices can be posted elsewhere on the internet and be available for longer periods as well as be accessed by more individuals. This also allows Agencies to better manage their limited budgets. The revised policy does not prohibit an Agency for publishing the notice more than once. 2-102(B) involves the selection process of contracting with a design professional (architect/engineer) and Ark. Code Ann. §19-4-1405 and §22-9-203 both involve the bidding process of contracting with a Contractor.*

(3) Can you explain 2-106(f)(2)? Is it saying there's a special list of professionals for these type of projects? *If the reference is to 2-106(A)(2), then the answer is no. For projects estimated at more than \$1 million, Agencies are required to run a separate advertisement and RFQ process. The word "project specific" in 2-106 (f) (2) is referring to projects which are more than \$ 1 million and state the specifics of the project in the advertisement. (As opposed to projects under \$1 million which the design professional may be able to do several projects under \$1 million.)*

(4) Is 2-201(A)(2) simply reciting the provisions of the Energy Office rules? I compared this to 22-3-2002 and I noticed that the term "insured value" is used in place of "replacement value". Do you view those terms as synonymous? *Yes, basically it is reciting provisions that can be found in §22-3-2001 et seq. and AEO rules. The term "insured value" is taken from the AEO rules as shown Chapter 2, paragraph O, subparagraph i.*

(5) I noticed that 2-300(D) provides for the possible forfeiture of design fees. Is there a statute that authorizes ABA to impose penalties such as that? *Deliverables such as reports, assessments, etc. are often contracted for by Agencies. This section was not intended to be a "penalty" but was merely reflecting that if a service is not delivered then payment for that particular service could not made. After reviewing the language, we now understand the harshness of the word "forfeiture" and we will remove the word "forfeiture". The removal of the language will have no bearing contractually regarding payment for services or the non payment of services not rendered.*

(6) 2-301(B) -- Why was old (B) deleted that limited the length of terms and allowed for (and prohibited other) amendments? And I gather the new (B) is allowing for additional fee arrangements? *The old (B) was deleted due to DF&A rules addressing these issues. The assumption of new (B) is correct.*

(7) 2-302 --What is the intent of these revisions? Why is the length of term language being deleted? Why has the term "construction" cost been added? 19-11-1001 just says one million in "cost". *Changes in (A) made for clarifications and to avoid future conflicts should § 19-11-1001 be amended and the length of term was deleted to conform to current law. Since §19-11-1001 addresses design professionals ABA has understood this cost to mean the construction cost covered by the design professional contract.*

(8) 2-303 -- Why will notification of a lump sum fee no longer be required? *This paragraph states that lump sum and hourly fees an acceptable alternative to percentage fees. It is commonly known by the consultant market that many Agencies use these alternatives and these alternative rates are*

negotiated and included in the final contract. Failure to state this in the public notice has prohibited some Agencies from completing an otherwise successful solicitation thus requiring them to start the process over and incur the cost twice. Deleting this requirement does not change the intended practice of negotiating these types of fees. It is intended to streamline the procurement process by eliminating a potential problem.

(9) 2-304 and 305 -- Why was the multiplier changed? *Current industry practice by design professionals is to negotiate contracts with a 0-10% multiplier. This change is to reflect current practice.*

(10) 2-900 -- Are these waivers new or do they currently exist? I assume you would not waive any of these requirements that were statutory, correct? *The ABA Minimum Standards and Criteria are based on the development of a new construction project in the multi-million dollar range. It would be quite impractical to write standards for every conceivable project or situation that may be encountered. In the past when these situations are encountered the Section and the Agency's project coordinator have worked to resolve these issues. Adding this paragraph is necessary to provide guidance to the Agency and their design professionals on how this process should work and what is necessary to resolve these issues in a timely manner. Correct, statutory requirements will not be waived.*

(11) 2-902(F) -- Does this mean that section approval is no longer required for sole source and proprietary specifications? *Yes. The section will still retain approval on the final plans and specifications containing these specifications but will no longer do this in a separate prior review. The new policy should provide for more transparency in this process while still allowing the Agency to obtain the needed materials or equipment.*

(12) 2-903(J) -- Does this mean the section does not have to approve the RFP, criteria, and analysis? *Yes, procurement of owner furnished equipment is a commodity purchase subject to DFA/Office of State Procurement law/rules.*

(13) 2-903(15) -- What is LEED MR Credit 5? It sounds like it would exclude persons more than 500 miles from the project site. *LEED stands for Leadership in Energy Efficiency Design and is encourage but not mandated under current law. A project pursuing a LEED certification is awarded points for compliance with various design recommendations which include the use of regional (within 500 miles) materials or equipment. MR Credit 5 is the credit category under which these points are awarded. The intended exception in this paragraph is to allow agencies to pursue these points without violating the ABA MSC.*

(14) 2-1203 -- Given this language, what are the requirements for single-ply membranes? *Single-ply roofing has become a very common system in the market place. This change is intended to acknowledge that single-ply roofing is no longer considered an "unconventional roofing system". There are no new or additional requirements for single-ply systems.*

(15) A few energy-related questions after looking at the acts you cited: In 2-201(a)(6), is the BTUH/SF/YR requirement for major facilities statutory? *Act 1494 of 2009 (§22-3-2001 et seq.) requires a reduction in energy consumption below "baseline" consumption. Different utilities are billed in different unit of energy (i.e Kwh for electricity and Cubic Feet for natural gas). BTUH/SF/YR is the*

industry standard for evaluating consumption where different utilities are involved to arrive at accurate comparisons with a base year or other system alternatives.

(16) Are the life cycle cost analysis provisions of 2-801 statutory or is that mandated by the Energy Office (the act seems to give them authority over such issues)? *Act 1494 of 2009 requires the Energy Office to develop an energy program that will reduce total energy consumption for state buildings over the fiscal year 2007-2008 if the savings can be justified by a life cycle cost analysis (§22-3-2006 (a) (1). It appears that the Act gives AEO the authority to develop the program.*

(17) And at 2-1000, do the construction documents for new public school facilities include renovations and additions? *No, ACT 1006 placed review of renovations and additions for public schools in the Arkansas State Fire Marshal's Office.*

(18) Is the Energy Office only requiring life cycle cost analysis on major projects? *Act 1494 (specifically 25-4-406(b)(2)(B)) suggested a life-cycle cost analysis for all construction or renovation. I gather Section 2-801 is only seeking to require what the Energy Office is requiring. Also, is BTUH/SF/YR in 2-201(a)(6) how baseline is determined under ASHRAE 90.1-2007, as suggested by 25-4-404(b)(1)? Yes, 2-801 is mirroring the requirements of the Energy Office and encouraging agencies to use life cycle costing when it is not otherwise mandatory. The ASHRAE Standard referenced in ACT 1494 requires the uses of computer simulation programs that have the ability to calculate energy consumption for all 8760 hours per year and that baseline calculations shall be based on usage, number of floors and conditioned floor area. The resulting calculations from these programs typically report out in BTUH/SF. To account for the daily and seasonal deviations, the customary units used for comparison are BTUH/SF/YR. When comparing projects designed energy consumption to the baseline year as required in ACT 1494, the consumption must be expressed in yearly totals in order to get an accurate comparison.*

SECTION 3

(1) 3-101(B) -- What is the authority for this exemption? Is any of this statutory? *Public works laws require the formal bidding of projects which exceed \$20,000. ABA maintains approval and oversight for all formal bids (§19-4-1402 and 1405). §22-2-108 (9) establishes authority without limitation for bidding processes found in (B) and (C).*

(2) 3-318(A) -- Will insurance be set on a case-by-case basis or are there standards for coverage? The rule says "less than below" but I didn't understand what that means. *Insurance policies requirements and coverage amounts are set on case-by-case basis, due to the variables that can affect insurance needs for each project. The agency requiring the capital improvement project will be responsible for setting their insurance requirements and coverage amounts. They can seek assistance from the Risk Management Department of the Insurance Commission if needed. We provide recommended policies and minimums for coverage amounts that will apply to majority of the projects. We will amend the sentence to "...less than what is stated below" to provide more clarity.*

(3) 3-318(C) -- Why will the agency and contractor no longer be named as the insured? Who will be named? *The contractor will be named as the insured on the builder's risk policy. After several discussions with the Office of Risk Management (Department of Insurance) it was recommended by Risk Management to remove the requirement of listing the agency as insured on the Contractor's policy.*

Agencies facilities are insured. We did not want to mandate that agencies be made "additional insured" thereby creating some exposure to liability issues if the language remained. We will encourage agencies to consult with their legal counsel regarding adding this language into bid specifications.

(4) 3-318(F) -- Why will the agency and other parties no longer be named as an additional insured? *The Office of Risk Management (see #3 above) recommended the deletion of the language.*

(5) 3-318(I)(1) -- How long does coverage need to be maintained since "2 years" is deleted here? Also, I'm not sure one sentence is drafted clearly -- I wonder if some more language should be deleted (I'm looking at "Such coverage shall include. . ." . *We discovered products and completed operations requirement is not normally associated with number of years with the insurance industry. The statute of limitations for performance and payment bonds is 1 year after ABA has approved the final payment of the project.*

(6) 3-318(g) -- Why are the owner, board , officers, etc. no longer listed as additional insureds? *The Office of Risk Management (see #3 above) recommended the deletion of the language.*

(7) 3-406 -- Why will proof of advertising only be required if placed by the agency or design professional? *The Construction Section staff regularly places the advertisement and therefore maintains proof of the action taken. If for some reason the Construction Section does not place the advertisement, it will need proof by the entity that placed it.*

SECTION 4

(1) 4-102(A)(5) -- What authority requires agencies to have StEP plans? Is that required by EP-09-07? *Yes, StEP plans are a requisite of the Governor's Executive Proclamation.*

SECTION 5

(1) 5-101(H) -- Does procurement law govern when an RFP is required? *Leases are exempt from procurement laws regulated by DFA/OSP (specifically excluded from the definition of "commodity" (§19-11-203)). This is the reason why the RFP/Bid processes in Section 5 exist.*